



HOUSE BILL 129: Level Playing Field/Local Gov't Competition

2011-2012 General Assembly

Committee:	Senate Finance	Date:	April 13, 2011
Introduced by:	Reps. Avila, Howard, Carney, Wainwright	Prepared by:	Heather Fennell
Analysis of:	PCS to Third Edition H129-CSTD-14		Committee Counsel

SUMMARY: *House Bill 129 would create new requirements for cities and joint agencies that operate a communications service that is offered to the public for a fee. The PCS expands the service area boundary for MI-Connection and makes clarifying and conforming changes. All of the changes made in the PCS are provided in the bill analysis section below.*

[As introduced, this bill was identical to S87, as introduced by Sen. Apodaca, which is currently in Senate Judiciary I.]

CURRENT LAW: Under G.S. 160A-311, cities are authorized to operate and finance a number of public enterprises, including cable television systems. A North Carolina Court of Appeals case, *BellSouth Telecommunications, Inc. v. City of Laurinburg*, 168 N.C. App. 75, 606 S.E. 2d 721 (2005), interprets the statutory authority to operate a cable television system to include operation of a fiber optic network. Morganton (CoMPAS Cable TV), Salisbury (Fibrant), Wilson (Greenlight), and Mooresville and Davidson (MiConnection) currently offer cable and internet service as a public enterprise.

The cities that currently operate cable and internet systems financed their systems through the installment purchase contract method authorized by G.S. 160A-20. This financing mechanism is commonly known as certificates of participation. Under this financing method, a city enters into an installment contract secured by a security interest in the system that is constructed. Unlike the issuance of general obligation bonds, installment purchase financing is not subject to a vote of the people. The Local Government Commission must approve a local unit's use of certificates of participation and the unit must give notice and hold a public hearing before it can enter into certificates of participation involving real property.

BILL ANALYSIS: House Bill 129 would create a new Article 16A in Chapter 160A of the General Statutes. The new Article would provide the following:

Communications Service Definition: The bill defines "communications service" as the provision of cable, video programming, telecommunications, broadband, or high-speed Internet access service to the public for a fee. "City-owned communications service provider" includes cities that offer the service through an interlocal agreement or joint agency. Data sharing between governmental entities and service offered to the public for free are not included in the definition of "communications service" and therefore, not subject to the limitations in the bill. The PCS provides that the sharing of voice service between government entities is also excluded from the definition. The PCS also clarifies that the sharing of data and voice between governmental entities must be for *internal* governmental purposes.

High-speed Internet Access Service Definition: The bill defined "High-speed internet access service" as service with transmission speeds consistent with basic broadband service as defined by the FCC. The PCS clarifies the service can be equal to or greater than the FCC requirements. The PCS also clarifies the reference is to the FCC requirements for broadband tier 1 service for broadband data gathering and reporting.

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Requirements for City-owned Communications Providers: The bill would require city-owned communications service providers to comply with all of the following:

- All State, local, and federal laws and regulations that a private company providing the same service would be subject to.
- Establish separate enterprise funds for the communications service. Conduct annual audits of the communications service. The annual audit conducted under G.S. 159-34 satisfies this requirement.
- Limit the provision of service to the jurisdictional boundaries of the city.
- Prohibit the use of the city's authority to require individuals or developments to subscribe to the communications service.
- Provide nondiscriminatory access to other service providers to the city's rights-of-way, poles, or conduits.
- Prohibit advertisements of the city-owned communications service on PEG channels of competing providers if the channel is required to be carried on the system of another service provider. Prohibit the use of funds not allocated to the communications service for advertisement.
- Prohibit the subsidization of the communications service with other revenue.
- The service must not be priced below the cost of providing the service. The cost of providing the service must include the cost of capital components that would be equal to the cost of capital components a private provider would incur and an amount equal to all taxes a private provider would pay.
- Remit to its General Fund an amount equal to all the taxes and fees a private provider would pay if the private provider supplied the service..

Cities that choose to sell or discontinue a city-owned communications service would not be required to hold a referendum prior to sale or discontinuous of the service.

Exemptions: The following exemption are exempt from the provisions of the bill:

- A city that provides communications services, including intergovernmental data or voice sharing, within its jurisdictional boundaries for the city's internal governmental purposes is exempt from the provider requirements, limitations on installment purchase contract financing, requirements of payments in lieu of taxes, and public-private partnership requirements. The PCS conforms the exemption for internal governmental purposes with the language used in the definition for "communications service."
- The provision of communications services in an area that has been established by order of the Utilities Commission to be an "unserved area" are exempt from the provider requirements, public hearing requirements, limitations on installment purchase contract financing, and requirements of payments in lieu of taxes. For the purposes of this determination, unserved area is an area in which 50% of the households have no access to high-speed internet, or only access to high-speed internet from a satellite provider. The PCS clarifies that the unserved areas will be determined by census block.

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- Cities that are offering communications service as of January 1, 2011 are exempt from all of the provisions in the bill provided the city limits the provision of service to any one or more of the following:
 - Persons within the corporate limits of the city providing the service. The PCS clarifies that the corporate limits include areas in the corporate limits as of April 1, 2011, and any later annexed areas.
 - Existing customers of the service as of April 1, 2011, provided that contracts outside the service area is subject to public bidding upon expiration.
 - The following service areas:
 - For MI-Connection – the PCS expands the service area to the combined areas of the city of Cornelius; the town of Troutman; the town of Huntersville; the unincorporated areas of Mecklenburg County north of a line beginning at Highway 16 along the west boundary of the county, extending eastward along Highway 16, continuing east along Interstate 485, and continuing eastward to the eastern boundary of the county along Eastfield Road; and the unincorporated areas of Iredell County south of Interstate 40, excluding Statesville and the extraterritorial jurisdiction of Statesville.
 - For the city of Salisbury – the cities of Salisbury, Spencer, East Spencer, Rockwell, Granite Quarry, and the corridors between those cities to the extent necessary to serve those cities.
 - For all other cities and joint agencies – the area designated in the map filed with the notice of franchise.

The PCS makes the following two clarifications to the exemptions:

- The exemptions do not exempt a city or joint agency from laws of general applicability, including nondiscrimination requirements.
- A city that is subject to a service area boundary will have 30 days from discovery or notice of providing service outside of the boundary to cease providing service outside the boundary without losing the exemption.

Public Hearings: Prior to offering communications services, cities would be required to hold at least 2 public hearings for comment on the service. The cities are required to provide notice for the hearings in the local newspaper and with the Utilities Commission. Private communications providers must be allowed to participate in the hearings. Feasibility studies, business plans, and public surveys for the communications service are deemed public records and must be available to the public prior to the hearings. The public hearing requirement does not apply to the repair or upgrade of an existing service.

Financing: Cities and joint agencies would be prohibited from incurring debt for a communications system unless it holds a special election. Cities and joint agencies are also prohibited from using installment purchase contracts and certificates of participation to finance a communications network unless it holds a holds a special election. The prohibition on certificates of participation and the referendum requirement would not apply to repairs or improvements of an existing system.

Taxes, Payments in Lieu of Taxes: Cities and joint agencies operating a communications service would be required to make the following payments in lieu of taxes:

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- To the applicable county, a payment of the amount of property taxes that would be due if the communications system was subject to the property tax.
- To the State, an amount set by the Department of Revenue that approximates the amount of income, franchise, vehicle, motor fuel and other taxes that would be due if the communications system was subject to these taxes. Cities subject to this provision must provide information to the Department of Revenue necessary for the calculation of the payment. The PCS also provides that the amount of the assessment is set by January 1 of each year, and due by March 15 of each year.
- Cities and joint agencies would not receive a sales tax refund for purchases related to the provision of the communications service.

Public-Private Partnerships for Communications Service: Cities would be required to solicit proposals from private providers before constructing a communications network. Cities must issue request for proposals that requires proposals to have sufficient information to make an objective evaluation of the proposals. The city must provide notice of the request for proposals. The city may consider any relevant factors, including system design, system reliability, operational experience, operational costs, compatibility with existing systems and equipment, and emerging technology. If the city is unable to negotiate terms with the 2 most responsive proposers, the city may proceed with offering communications service.

Designation as Public Utility: Cities and joint agencies that provide telephone service would be included in the term "public utility" as defined by Chapter 62 of the General Statutes. Telephone service provided by these entities would be subject to oversight by the Utilities Commission. This section does not expand the regulatory authority of the Utilities Commission in regards to telephone service.

Additional Financing Requirements: For review by the Local Government Commission (LGC) of an application for financing the construction, operation, expansion, or repair of a communications system by a city or joint agency, the following would apply:

- The public hearings required by the bill must be held before an application for financing may be submitted.
- A copy of the application must be given to private communications providers that serve the city and areas adjacent to the city. The LGC must accept written and oral comments from private providers as a part of the application review.
- The LGC must consider and make written findings regarding the reasonableness of the revenue projections of the service in light of the current and projected competitive environment, the impact of innovation, and the level of community support for the project.

Revenue Bonds: Cities may issue revenue bonds to provide a cable television system. Although a referendum is not normally required for revenue bonds, cities that offer communications service as defined in G.S. 160A-340.1 would be subject to G.S. 160A-340.4(b) which requires a city to hold a referendum before incurring debt to construct a communications system.

EFFECTIVE DATE: This act is effective when it becomes law and applies to the provision of communications services by cities or joint agencies on or after that date.